RESPONDENT'S BRIEF IN SUPPORT OF PETITIONER

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Nos. 04-277 & 04-281

IN THE
Supreme Court of the United States

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, ET AL.,
Petitioners,

AND

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Petitioners,

v.

BRAND X INTERNET SERVICES, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS BELLSOUTH AND SBC IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Federal Communications Commission is permitted to conclude that broadband Internet access does not include a "telecommunications service" under the Telecommunications Act of 1996, but rather is solely an "information service."

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, respondents BellSouth Corporation, BellSouth Telecommunications, Inc., and SBC Communications Inc. state the following:

BellSouth Telecommunications, Inc. is a wholly owned subsidiary of BellSouth Corporation, a publicly held corporation. BellSouth Corporation has no parent company, and no publicly held company owns 10% or more of its stock.

SBC Communications Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

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PRELIMINARY STATEMENT

This case involves the efforts of the Federal Communications Commission ("FCC" or "Commission") to bring coherence to the regulation of the market for broadband Internet access services. In the Telecommunications Act of 1996 ("1996 Act" or "Act"), Congress specifically directed the FCC to "encourage the deployment" of broadband services by, among other things, "utilizing . . . measures that promote competition" and "remov[ing] barriers to infrastructure investment." 47 U.S.C. § 157 note. That ambitious goal, however, has gone largely unfulfilled, as the industry has labored under a patchwork of confused and contradictory regulatory rules that generally predate the 1996 Act, that are predicated on outdated technologies, and that forestall the substantial investment necessary to bring broadband to all consumers.

Recognizing this, the FCC—beginning fully four years ago—took definitive steps towards establishing a coherent regulatory framework that applies equally to all providers of broadband, including not just the cable providers that are petitioners here, but also telephone companies such as respondents SBC and BellSouth. The FCC order at issue here is a key part of that effort. It classified cable modem service—the leading broadband Internet access service—as an "information service" under the 1996 Act, and it set the stage for the FCC to construct a coherent broadband regulatory framework around that classification. Indeed, at the same time as it released the order at issue here, the FCC tentatively concluded that the same classification applies to the wireline broadband Internet access provided by telephone companies (*i.e.*, Digital Subscriber Line ("DSL") Internet access services), and it further announced an initiative to develop a deregulatory policy framework, based on that classification, that "encourage[s] the ubiquitous availability of broadband to all Americans," that "promotes investment and innovation in a competitive market," and that "is consistent, to the extent possible, across multiple platforms." Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access*

to the Internet over Wireline Facilities, 17 FCC Rcd 3019, 3021-23, ¶¶ 3-6 (2002) ("*Wireline Broadband NPRM*").

The Ninth Circuit's decision below throws that process into disarray. In reliance on circuit precedent in a case to which the FCC was not even a party—and in direct conflict with the considered judgment of the expert agency—the decision below declares that, as a matter of pure statutory interpretation, broadband Internet access provided over cable necessarily includes a "telecommunications service" and is thus subject to common-carrier regulation under Title II of the Communications Act of 1934. That determination, and the circuit precedent on which it relies, rests on elemental misconceptions of federal telecommunications law. It should be reversed, and the FCC's classification should be affirmed by this Court, so that the FCC can continue the critically important business of creating a broadband regulatory environment that, as Congress directed, encourages deployment and reduces barriers to investment.

STATEMENT

A. Today's broadband regulatory environment is out-of-step with the realities of the market. Broadband Internet access services are highly competitive. At the time of the order under review, the market was already characterized by "a continuing increase in consumer broadband choices" offered over a wide array of transmission platforms, including cable facilities, telephone lines, satellite, fixed wireless, and mobile wireless. *E.g.*, Third Report and Order and Memorandum Opinion and Order, *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, 15 FCC Rcd 11857, 11864-65, ¶¶ 18-19 (2000). Today, that trend is even more pronounced. As the Commission recently reported, while cable modem service providers continue to serve comfortably more than half of all broadband Internet access subscribers, the success of other broadband platforms—including DSL, wireless (unlicensed and licensed),

broadband-over-power-lines, and satellite—ensures that broadband will continue to be offered over a "variety of technologies." Fourth Report to Congress, *Availability of Advanced Telecommunications Capability in the United States*, 19 FCC Rcd 20540, 20553, 20557-62, 20568 (2004) ("*Fourth Report*"). In short, "the competitive nature of the broadband market, including new entrants using new technologies, is driving broadband providers to offer increasingly faster service at the same or even lower retail prices." *Id.* at 20552.

Despite the fact that various transmission platforms compete directly against one another head-to-head in this highly competitive market—and have been doing so for years—there remains significant uncertainty as to their regulatory status, including whether competing technologies will be regulated uniformly under federal law. Until the order at issue here, for example, the FCC had not classified cable modem service at all, much less articulated rules that would apply to that particular service. As a result, cable operators provided cable modem service largely free from any federal regulation, while at the same time contending with the regulatory efforts of state and local franchising authorities. The FCC has been similarly silent with respect to fixed wireless and satellite, creating uncertainty over the potential scope of regulation with respect to those broadband platforms as well.

Meanwhile, the FCC has regulated DSL service provided by telephone companies—which provide service to barely one-third of broadband consumers—as though it were provided in a monopoly environment. Three decades ago, the FCC initiated a proceeding, known as the *Computer Inquiry*, to examine the relationship between the then-nascent computer industry and the public switched telephone network. *See generally* Report and Order, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 104 F.C.C.2d 958, 966-86, ¶¶ 9-45 (1986) ("*Computer III*"). The various rules that grew out of that proceeding were predicated on the understanding that the public switched telephone network was the exclusive means

for transmitting the "ever expanding variety of information" made possible by new "computerized data processing" technologies, as well as the concern that "the telephone industry could use its monopoly of the [telephone] lines to prevent competition from developing." *California v. FCC*, 39 F.3d 919, 923-24 (9th Cir. 1994) ("*California II*"); *see also Computer III*, 104 F.C.C.2d at 969, ¶ 12 (stressing concern that "major carriers could use their control over basic services to discriminate against others' competitive services").

Based on this understanding and concern, the FCC imposed an array of regulatory requirements upon the incumbent telephone companies (such as SBC and BellSouth) insofar as they wanted to provide so-called "enhanced" services. The Commission broadly defined enhanced services to include "any offering over the telecommunications network . . . more than a basic transmission service." Final Decision, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384, 420, ¶ 97 (1980) ("*Computer II*"); *see also* 47 C.F.R. § 64.702(a) (defining "enhanced service[s]" as, *inter alia*, services "which employ computer processing applications that act on the format . . . of the subscriber's transmitted information"). And, although the specific rules that governed telephone-company provision of such enhanced services evolved over the next decade, the FCC eventually settled on a regime in which local telephone companies were required to peel off a pure transmission component from their enhanced services offerings, and to provide that stand-alone transmission component to unaffiliated Internet service providers ("ISPs") on a common-carrier basis, pursuant to tariff. *See Computer III*, 104 F.C.C.2d at 964, ¶ 4. As a result, while most service providers—including, for example, database companies such as Lexis/Nexis and fledgling Internet access providers—could offer "enhanced services" free from regulation, telephone companies offering such services also were required to perform what the FCC has properly termed "radical surgery" on their offerings, in order to create and then offer to competing providers a pure transmission service

that the FCC could regulate as common carriage under the Communications Act. *See* FCC Pet. App. 100a-101a (¶ 43). *See generally Wireline Broadband NPRM*, 17 FCC Rcd at 3036-40, ¶¶ 33-42 (discussing history of *Computer Inquiry* regime).

As the FCC has emphasized, the *Computer Inquiry* proceeding was predicated on the existence of a "one-wire world"—*i.e.*, a world in which all service providers, if they wished to offer enhanced services, required access to the public switched telephone network. Notice of Proposed Rulemaking, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, 16 FCC Rcd 22745, 22748, ¶ 5 (2001) ("*Wireline Broadband Non-Dominance NPRM*"). Even so, as telephone companies seeking to compete with the cable providers rolled out competitive broadband Internet access services using DSL, the FCC simply assumed, without scrutinizing the issue, that the *Computer Inquiry* rules applied to those services. *See* Memorandum Opinion and Order, and Notice of Proposed Rulemaking, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, 24030-31, ¶ 37 (1998) (noting without analysis "that [Bell Operating Companies ('BOCs')] offering information services to end users of their advanced service offerings, such as xDSL, are under a continuing obligation to offer competing ISPs nondiscriminatory access to the telecommunications services utilized by the BOC information services"). That assumption, in turn, resulted in a distorted regulatory regime in which most competing broadband service providers, including the market-leading cable modem providers, operated free from federal regulation, but telephone companies that rely upon their own local exchange facilities to provide DSL did not. The telephone companies alone were required to separate out an underlying broadband transmission path in order to offer it to competing providers on a common-carrier basis pursuant to tariff, without the associated Internet access service.

This haphazard state of regulatory affairs—in which telephone companies that serve barely a third of the market were regulated as dominant, while everyone else was left to guess over the rules that will ultimately apply—has significantly inhibited the deployment of broadband. It created substantial uncertainty over the extent to which various potential broadband platforms will be subject to regulation, and whether they will compete on a level playing field, thus undermining the certainty that is necessary to warrant the massive investments needed to build-out broadband facilities on a widespread basis. Equally important, it increased the costs of telephone companies and thereby diminished their ability to act as a competitive counterweight to the cable companies, thus distorting the competitive process and curtailing investment that would otherwise occur. At least in part as a result, the United States—which once boasted broadband deployment and penetration rates unmatched elsewhere—has slipped to 11th in overall broadband penetration, and as low as 18th in DSL penetration. *See Fourth Report*, 19 FCC Rcd at 20579.

B. Recognizing the compelling need for reform, the FCC undertook a comprehensive effort to bring uniformity and coherence to the regulation of broadband. The *Declaratory Ruling* at issue here is the first step in that effort. There, the FCC for the first time classified broadband Internet access provided over cable facilities. It first reached the unremarkable (and largely uncontested) conclusion that cable modem service is an "information service" under the 1996 Act, a term that, for present purposes, is equivalent to the "enhanced services" designation the FCC developed in the *Computer Inquiry* proceeding. *See* FCC Pet. App. 91a-95a (¶¶ 36-38); *see also* 47 U.S.C. § 153(20) (defining "information service"); First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, 11 FCC Rcd 21905, 21955-56, ¶¶ 102-103 (1996) (the 1996 Act's term "information service" includes all "enhanced services"). It then made clear

that the cable operators that provide this service are not subject to the FCC's *Computer Inquiry* rules, and that—contrary to the Ninth Circuit's prior assumption in *AT&T Corp. v. City of Portland*, 216 F.3d 871, 877-78 (9th Cir. 2000)—they therefore need not separate out a distinct pure transmission service and offer it to unaffiliated service providers on a common-carrier basis. *See* FCC Pet. App. 98a-102a (¶¶ 42-44). Furthermore, "[e]ven if [the] *Computer [Inquiry]* rules were to apply" to cable modem service providers, the Commission exercised its discretion to "waive" them, on the theory that such a waiver would "'encourage the deployment . . . of advanced telecommunications capability to all Americans.'" *Id.* at 102a-104a (¶¶ 45-47) (quoting 47 U.S.C. § 157 note). Finally, because the cable operators are not required to offer pure broadband transmission indiscriminately on standardized terms, and because they generally have not elected to do so to date, the FCC concluded that cable modem service does not contain a separable "telecommunications service"—*i.e.*, a pure transmission service offered to competing providers on a common-carrier basis. *See id.* at 95a-98a, 109a-114a (¶¶ 39-41, 52-55). Instead, in those instances where cable operators do provide unadorned transmission to unaffiliated service providers, they do so as "private carriage." *See id.* at 109a-114a (¶¶ 52-55).

Although the *Declaratory Ruling* is a necessary first step in providing clarity and coherence to the regulation of broadband, it does not—indeed, it cannot—stand alone. Rather, it is an elemental principle of federal telecommunications law that like services must be treated alike. Accordingly, at the same time as it classified cable modem service as solely an "information service," the FCC tentatively concluded that the same classification would apply to DSL-based broadband Internet access service. *See Wireline Broadband NPRM*, *supra*. The FCC has further invited comment on a regulatory framework that would apply to *both* DSL-based service and cable modem service. *See id.*; FCC Pet. App. 133a-168a (¶¶ 72-112). Although the FCC's notices are broad and the FCC is reviewing a wide variety of proposals, the Commis-

sion has articulated principles that will guide its analysis of the questions it has posed. As noted at the outset, the Commission has pledged to "encourage the ubiquitous availability of broadband to all Americans," "promote[] investment and innovation in a competitive market," and regulate "consistent[ly], to the extent possible, across multiple platforms." *Wireline Broadband NPRM*, 17 FCC Rcd at 3021-23, ¶¶ 3-6; *see also* FCC Pet. App. 134a-135a (¶ 73).

Thus, before the decision below, the FCC had initiated a comprehensive process with the goal of bringing much needed certainty and coherence to the regulation of broadband Internet access. The Ninth Circuit's decision below, however, has stopped that process in its tracks. The decision correctly holds, consistent with the FCC's order, that broadband Internet access provided over cable is an "information service" under the 1996 Act. But, contrary to the FCC's order—and in reliance on the prior *City of Portland* decision issued before the FCC's ruling—the decision further holds that, as a matter of statutory interpretation, broadband Internet access provided over cable also includes a "telecommunications service" that is subject to common-carrier regulation under Title II of the Communications Act. *See* FCC Pet. App. 21a-22a. As a result, the decision threatens to subject cable modem service—and, by extension, all broadband Internet access services—to the full panoply of regulatory obligations that apply to traditional telecommunications services under Title II of the Communications Act.

SUMMARY OF ARGUMENT

The FCC reasonably concluded that broadband Internet access service provided over cable is an "information service." The 1996 Act defines that term to encompass "a capability for," among other things, "generating, acquiring, storing, . . . utilizing, or making available information via telecommunications," 47 U.S.C. § 153(20), a description that comfortably encompasses broadband Internet access, whether provided over cable facilities or any other transmission platform. Indeed, the Ninth Circuit did not dispute that cable modem service is an "information service" under the 1996 Act.

The FCC's conclusion that broadband Internet access provided over cable does *not* contain a "telecommunications service" is also lawful. The 1996 Act, along with Commission and court precedent, makes clear that a "telecommunications service" is a distinct, stand-alone product that (1) consists of pure transmission and (2) is offered on a standardized, common-carrier basis. Cable modem service, like other broadband Internet access services, is not pure transmission; rather, it is an "information service" that *uses* broadband transmission as part of an integrated service. And, to the extent some cable operators provide a separate broadband transmission product to unaffiliated ISPs, they do so as "private carriage"—*i.e.*, on an individualized, case-by-case basis, without exhibiting the hallmarks of common carriage.

It is accordingly clear that cable providers, as they operate today, do not offer a "telecommunications service" under the Act. The Ninth Circuit's decision to the contrary appears to be based in large part on its views regarding a related but distinct question: whether cable providers *should be required* to offer a telecommunications service—not under the plain terms of the Act, but rather under the *Computer Inquiry* rules or some analogue to those rules. The Ninth Circuit's decision, as illuminated by Judge Thomas's concurring opinion, is rooted in the background principle that, because cable modem service is equivalent to DSL-based Internet access, the two services must be classified in the same manner. But, while that background principle of regulatory parity is correct, it does not necessarily follow that all broadband Internet access service providers should be forced to provide a discrete "telecommunications service" to competing providers. Nothing in the statute suggests that the *Computer Inquiry* rules must necessarily be applied to *any* provider in the highly competitive broadband market, and it is therefore within the discretion of the Commission to determine the proper regulatory treatment of those services. Provided the Commission does so consistently—treating all competing providers of broadband Internet access equally as it has

expressly stated it intends to do—there is no basis on which to disturb its judgment here.

ARGUMENT

THE FCC REASONABLY CONCLUDED THAT BROADBAND INTERNET ACCESS SERVICE IS AN "INFORMATION SERVICE" THAT DOES NOT INCLUDE A "TELECOMMUNICATIONS SERVICE"

A. The 1996 Act defines an "information service" as "a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(20). Broadband Internet access service does precisely that. As the FCC explained, broadband Internet access provides end users "content, e-mail accounts, access to news groups, the ability to create a personal web page, and the ability to retrieve information." FCC Pet. App. 52a-53a (¶ 10) (footnotes omitted); *see id.* at 56a (¶ 11). Accordingly, as virtually no one disputed before the Commission, and as the court of appeals correctly recognized, *see id.* at 21a, the FCC properly categorized cable modem service—which is nothing more than a broadband Internet access service that happens to be provided over cable facilities—as an "information service" under the 1996 Act.

The more contentious question is whether, in addition to constituting an "information service," broadband Internet access service simultaneously qualifies as a "telecommunications service" under the Act. The 1996 Act defines "telecommunications" as pure transmission—*i.e.*, "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). A "telecommunications service," in turn, is the offering of such pure transmission "for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." *Id.* § 153(46).

Taken together, these definitions are consistent with the traditional test for common carriage, which asks (1) whether the service permits transmission of "intelligence of [the customer's] own design and choosing," and (2) whether that transmission service is offered to all comers "indiscriminately." *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 608-09 (D.C. Cir. 1976) ("*NARUC II*") (internal quotation marks omitted); *see FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979) ("[a] common-carrier service in the communications context is one that 'makes a public offering to provide [communications facilities] whereby all members of the public who choose to . . . may communicate or transmit intelligence of their own design and choosing'") (footnote omitted; second alteration in original); *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1480 (D.C. Cir. 1994). In fact, the FCC has held, and the D.C. Circuit has affirmed, that the "telecommunications service" definition under the 1996 Act is equivalent to the common-carriage test developed prior to the 1996 Act. *See, e.g.*, FCC Pet. App. 112a (¶ 55 n.205); Report and Order, *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 9177-78, ¶ 785 (1997); *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 926 (D.C. Cir. 1999). Accordingly, as the FCC explained in the order under review, *see* FCC Pet. App. 112a (¶ 55 & n.205)—and as the Ninth Circuit did not dispute—to include a discrete "telecommunications service," broadband Internet access service must include a common-carriage offering of transmission alone—*i.e.*, pure transmission offered on a standardized basis to all customers indiscriminately.

The FCC reasonably concluded that broadband Internet access provided over cable satisfies neither prong of the common-carrier test. *See id.* at 96a-97a, 112a-114a (¶¶ 40, 55). The broadband Internet access service that cable operators offer on a widespread basis is not pure transmission. Rather, it is "a single, integrated service" that "combines computer processing, information provision, and computer interactivity with data transport, enabling end users to run a variety of applications." *Id.* at 91a (¶ 36). And, to the extent

cable operators do offer the transmission component of this service on a stand-alone basis (to ISPs), they plainly do not do so "indiscriminately" or on standardized terms. On the contrary, that transmission is offered as private carriage to a select group and only on terms that are *not* made available generally. *See id.* at 109a-111a (¶¶ 52-53). Therefore, no serious argument can be made that cable modem service providers are in fact operating today on a common-carrier basis. *See Midwest Video*, 440 U.S. at 701 ("A common carrier does not 'make individualized decisions, in particular cases, whether and on what terms to deal.'") (quoting *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976) ("*NARUC I*")); *NARUC II*, 533 F.2d at 608-09; *see also Southwestern Bell*, 19 F.3d at 1481 ("Whether an entity in a given case is to be considered a common carrier or a private carrier turns on the particular practice under surveillance.").[1]

B. The real question at issue here is not so much whether cable modem service providers *are* operating as communications common carriers today—such that their broadband Internet access service could be considered to contain a "telecommunications service"—but rather whether they *should be*

[1] In the court of appeals, several parties objected to the Commission's classification of pure transmission, in the relatively few circumstances where cable providers provide such transmission to unaffiliated ISPs, as private carriage. But, as a descriptive matter, that classification is clearly correct. To the extent cable operators have chosen to provide such transmission, the record established that they have done so on an individualized basis, "determin[ing] in each particular case 'whether and on what terms to serve.'" FCC Pet. App. 112a (¶ 55) (quoting *Southwestern Bell*, 19 F.3d at 1481). And, as a prescriptive matter, the Commission's approach is equally reasonable. It is well-established that, in the absence of a transmission bottleneck, there is no basis for the FCC to force carriers to provide stand-alone transmission indiscriminately on a standardized basis. *See, e.g.*, Memorandum Opinion and Order, *AT&T Submarine Systems, Inc.*, 13 FCC Rcd 21585, 21589-91, ¶¶ 9-11 (1998), *pet'n for review denied, Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 925-27 (D.C. Cir. 1999).

required to act as such. That is to say, the question is whether, unless the FCC exercises its forbearance authority under 47 U.S.C. § 160(a), the agency is required, under the statutory provisions in the Act, to force all broadband Internet access providers to strip-out a pure transmission service from their integrated broadband service offering and offer that transmission service separately to ISPs on a common-carrier basis, merely because the FCC, in the past, has forced DSL-based providers to do so under the *Computer Inquiry* rules.

The Ninth Circuit appears to have answered that question in the affirmative. In *City of Portland*, the court likened cable modem service to DSL-based Internet access, and its conclusion that the former includes a discrete "telecommunications service" was based in part on the fact that, under the FCC's rules, DSL providers were forced to offer a separate transmission service. *See* 216 F.3d at 877-78 (describing the "pipeline" portion of cable modem service as equivalent to telephone lines and characterizing the cable "pipeline" as "a telecommunications service as defined in the Communications Act"). Likewise, in his concurring opinion below, Judge Thomas, who authored *City of Portland*, emphasizes the FCC's historical treatment of DSL-based Internet access (as including both an "information service" and a "telecommunications service"), and he concludes that analogous treatment must apply to cable modem service providers. *See* FCC Pet. App. 31a-32a (asserting that the FCC's prior treatment of "Internet access via DSL . . . reflects a much more reasonable reading of the statute" than the one adopted in the *Declaratory Ruling*). Accordingly, as the Ninth Circuit appears to view the matter, because the FCC has, as an historical matter, forced telephone companies that provide DSL-based Internet access to create (and sell to unaffiliated ISPs) a discrete "telecommunications service" that underlies their Internet access offerings, the FCC must force cable modem providers to do the same.

In one sense, the Ninth Circuit's analysis is correct. As noted at the outset, it is a basic principle of federal telecom-

munications law that like services must be treated alike, and there is accordingly no basis in law or policy that would permit the Commission to exempt cable modem service from the requirement to provide a separate common-carrier transmission service to unaffiliated ISPs, even as it continues to apply such a requirement to DSL-based service provided by telephone companies. Indeed, such a regime would be particularly arbitrary in view of the fact that it is the cable modem providers that are the nation's leading broadband Internet access providers, with a market share of well over 50%, while DSL-based providers serve barely a third of the market.

The core point, however, is that the statute does not require the Commission to impose such a *Computer Inquiry*-like requirement on *any* broadband Internet access service, regardless of the platform used to provide that service. On the contrary, the *Computer Inquiry* rules are purely a creature of the FCC's making. As a result, as to *both* DSL-based and cable providers, the FCC retains the discretion to limit those rules or remove them altogether, consistent with principles of reasoned decisionmaking. *See, e.g., FCC v. WNCN Listeners Guild*, 450 U.S. 582, 603 (1981). Indeed, at the same time as the FCC decided not to extend those rules to cable modem service providers (or, in the alternative, to waive them if they were otherwise deemed to apply), the FCC invited comment on whether to modify or eliminate them as to wireline providers such as SBC and BellSouth. *See Wireline Broadband NPRM*, 17 FCC Rcd at 3040, ¶ 43 (seeking comment on "whether the *Computer Inquiry* requirements should be modified or eliminated" with respect to DSL-based services).

In light of the highly competitive nature of the broadband market, moreover, it is clear that the *Computer Inquiry* rules have no place in broadband at all. As the FCC has explained, the *Computer Inquiry* proceeding was driven by the concern that "telephone companies [could] exercis[e] significant market power on a broad geographic basis" over the emerging market for enhanced services. *Computer II*, 77 F.C.C.2d at 468, ¶¶ 219-220. The resulting rules were therefore predicated on the existence of a "one-wire world"—*i.e.*, the

presence of a single bottleneck facility through which information services must pass. *See, e.g., California v. FCC*, 905 F.2d 1217, 1224 (9th Cir. 1990) ("*California I*") (FCC's rules reflect "concern[] that communications carriers would use their telephone exchange monopolies to obtain leverage in the competitive enhanced services market"); *California II*, 39 F.3d at 923-24 (FCC's rules were a response to the belief that "the telephone industry could use its monopoly of the [telephone] lines to prevent competition from developing in the enhanced services industry").

That predicate, however, is absent in broadband. As the FCC has found, while cable possesses the "most widely subscribed to technology" for broadband Internet access, it is facing increasing competition from multiple transmission platforms, including DSL, satellite, and fixed and mobile wireless. FCC Pet. App. 50a-52a (¶ 9); *see USTA v. FCC*, 290 F.3d 415, 428 (D.C. Cir. 2002) (noting the "robust competition . . . in the broadband market"), *cert. denied*, 538 U.S. 940 (2003); *Fourth Report*, 19 FCC Rcd at 20552 ("[T]he competitive nature of the broadband market, including new entrants using new technologies, is driving broadband providers to offer increasingly faster service at the same or even lower retail prices."). "[T]he one-wire world" that led to the creation and refinement of the *Computer Inquiry* rules thus "appears to no longer be the norm in broadband services markets." *Wireline Broadband Non-Dominance NPRM*, 16 FCC Rcd at 22748, ¶ 5. There is accordingly no basis for forcing *any* broadband service provider to perform the "radical surgery" called for by the *Computer Inquiry* rules, regardless of the underlying platform used to provide service. And, in all events, the FCC plainly has the discretion to limit the application of those rules, provided it does so in a uniform and coherent manner that avoids favoring any particular technology.

C. To the extent the Ninth Circuit believed that the text of the 1996 Act forecloses the Commission from exercising such discretion, the court is incorrect. There is no provision in the statute that requires the FCC to mandate the "radical

surgery" necessary to extract a stand-alone "telecommunications service" from every broadband "information service," whether provided over wireline, cable, or another platform. In his concurring opinion, Judge Thomas did not cite any provision of the Act that by its terms imposes such a requirement, nor could he have. Nor do the statutory provisions that he does cite establish that Congress unambiguously intended to impose such an obligation, as required to come within the first step of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Thus, for example, Judge Thomas stresses that the statutory definition of "'information service'" refers to a "'capability'" (to, for example, send or receive e-mail or access content on-line), and he insists that actually putting "this *capability* into practice" requires "*actual transmission*" that takes broadband Internet access service "outside th[at] definition." FCC Pet. App. 29a-30a (quoting 47 U.S.C. § 153(20)). In fact, however, as the FCC has explained, the "information service" definition refers not just to a "capability," but rather to a "capability" that is provided "'via telecommunications.'" *Id.* at 95a-96a (¶ 39). Thus, if anything, the fact that broadband Internet access includes an "*actual transmission*" component—*i.e.*, that it is provided "via telecommunications"—only underscores the reasonableness of the Commission's conclusion that it is an "information service" alone. In any event, contrary to Judge Thomas's understanding, the fact that broadband Internet access service includes such transmission plainly does not foreclose that classification.

Judge Thomas also disputes the FCC's conclusion that the statutory definition of "telecommunications service" refers to a pure transmission offering that is provided "separately"—*i.e.*, on a stand-alone basis. *Id.* at 30a-31a; *see id.* at 96a (¶ 39) (FCC conclusion that the "telecommunications component" of cable modem service "is not . . . separable from the data-processing capabilities of the service" and is thus not a "telecommunications service"). According to Judge Thomas, "[n]othing in the definition suggests that the telecommunications component *must* be priced or offered separately

. . . to qualify as a telecommunications service." *Id.* at 31a (emphasis added). But that assertion not only ignores the settled principle that a service must be offered indiscriminately under the same terms and conditions to qualify as common carriage (and thus a "telecommunications service") under the Communications Act, *see supra* p. 11, but also misconceives the nature of judicial review under *Chevron*. To resolve the issues here on the basis of "pure statutory interpretation" as Judge Thomas purports to do, *see* FCC Pet. App. 25a-26a, it is not enough to question whether, to qualify as a "telecommunications service" under the statute, a transmission service "must" be offered on a stand-alone basis. Rather, the question is whether the expert FCC *may* reasonably construe the statute in that manner. So long as this is a reasonable interpretation of the statute, it is one to which the courts must defer. And Judge Thomas has cited nothing in the statute that precludes this FCC interpretation or renders it unreasonable.

Finally, Judge Thomas notes that the 1996 Act's "information service"/"telecommunications service" taxonomy "parallel[s]" the *Computer Inquiry*'s "basic service"/"enhanced service" definitional scheme, and he asserts that this parallel "creates a presumption" that Congress intended the *Computer Inquiry* rules to apply in the broadband context. *Id.* at 35a-36a (internal quotation marks omitted). But Congress's use (with some modification) of these *definitions* says nothing at all about whether it approved of the *rules* established in the *Computer Inquiry* regime, much less that it intended the FCC to apply those rules to broadband. If Congress had intended to impose some analogue of those rules as federal law and to mandate their extension to broadband, it could easily have said so. But, as discussed above, there is no language in the statute imposing such a scheme. Moreover, it would be particularly odd for Congress to have taken such a step given that both the Commission and the courts had, prior to the 1996 Act, stressed the flexibility of the *Computer Inquiry* regime and the FCC's authority to apply and alter that regime as circumstances dictate. *See, e.g.*, *Computer II*, 77 F.C.C.2d at 430, ¶ 120 ("[w]e are faced with the reality that technology and consumer demand have combined to . . . overrun the

definitions and regulatory scheme of the *First Computer Inquiry*"); *Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 202-03 (D.C. Cir. 1982) (upholding FCC decision to detariff certain products previously covered by first *Computer Inquiry* order[2]); *California II*, 39 F.3d at 926-27. If Congress had intended to circumscribe the Commission's authority to adapt the *Computer Inquiry* framework as circumstances dictate, it would have done so directly and explicitly. As the 1996 Act's silence makes clear, it did not.[3]

In sum, the statute does not by its terms constrain the Commission's discretion to modify or eliminate the *Computer Inquiry* rules, nor does it require the Commission to apply those rules to broadband Internet access providers, including cable modem service providers. Rather, the statute gives the Commission the discretion to fashion a broadband regulatory framework that is appropriately suited to the competitive nature of the market. Provided the Commission exercises that discretion in a reasonable way—by, among other things, following through on its pledge to create a framework that is "consistent . . . across multiple platforms" and avoids

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[2] Final Decision and Order, *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, 28 F.C.C.2d 267 (1971) ("*Computer I*").

[3] Judge Thomas also points to a 1995 Senate Report that states that, while the term "telecommunications service" does not include "information services," the "underlying transport and switching capabilities on which these interactive services are based . . . are included in the definition of 'telecommunications services.'" S. Rep. No. 104-23, at 18 (1995); *see* FCC Pet. App. 36a-37a (Thomas, J.). That report, however, referred to a definition of "telecommunications service" that included "the transmission . . . of information services." S. Rep. No. 104-23, at 79. And, importantly, that definition was never enacted into law. If anything, the report in question thus suggests that Congress did *not* intend the term "telecommunications service," as it was ultimately defined, to encompass "the transmission . . . of information services." *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.") (internal quotation marks omitted).

"embed[ding] particular technologies," *Wireline Broadband NPRM*, 17 FCC Rcd at 3022, 3023, ¶¶ 4, 6—there will be no basis for objecting to its treatment of cable modem service as solely an "information service."

CONCLUSION

Considered in connection with the FCC's ongoing efforts to reform the regulatory framework for broadband Internet access, the *Declaratory Ruling* reflects a permissible exercise of the Commission's discretion. The judgment of the court of appeals to the contrary should be reversed.

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